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Bayland Sdn Bhd & Anor v Paulus De Kruijff

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HIGH COURT (KUALA LUMPUR) — CIVIL ACTION NO WA-22IP-77–12 OF 2019
MOHD RADZI HARUN J
3 MAY 2020

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Civil Procedure — Striking out — Counterclaim — Whether counterclaim was obviously unsustainable — Whether causes of action of malicious litigation/prosecution and tort of abuse of process was recognized by courts — Whether counterclaim was premature — Rules of Court 2012 O 18 r 19(1)

D

Tort — Abuse of process — Elements — Whether malice must be proved — Whether proceedings must be terminated — Whether cause of action was sustainable — Whether recognised by courts

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Tort — Malicious prosecution — Whether cause of action was sustainable — Whether recognised by courts

This was the plaintiffs' application pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 ('the ROC 2012') for the defendant's counterclaim against the plaintiffs to be struck out. The plaintiffs' causes of action against the defendant were as follows: (a) infringement of the first plaintiff's registered trademarks; (b) passing off products or services not originating from or connected to the first plaintiff as a product or services originating from or connected to the plaintiffs; and (c) using the plaintiffs' works as set out in Schedule 1 of the statement of claim. The defendant's defence was mainly premised on the contention that there was express or implied consent by the plaintiffs, for the sharing, dissemination and utilisation of the first plaintiff's trademark and the plaintiffs' works on the internet, including on social media. The defendant further pleaded that the plaintiffs had instituted their claims against the defendant as a vendetta against the defendant, for the defendant's works to the benefit of the Verve Suites Mont Kiara Management Corp ('VSMKMC') and its residents and proprietors which include the defendant's involvement in earlier separate court proceedings involving the VSMKMC against the first plaintiff and its related companies, and informed the residents and proprietors of the Verve Suites Mont Kiara of the non-performance and for poor performance of the managing agent, a related company with the first and second plaintiffs, in the management of the Verve Suites Mont' Kiara. The defendant pleaded that the plaintiffs' statement of claim was in bad faith,

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malicious and with the ulterior motive of damaging the defendant's business and reputation rather than furthering any legitimate interest of the plaintiffs. Consequently, the defendant counterclaimed against the plaintiffs for malicious litigation or prosecution and/or abuse of process of the court. The plaintiffs' application to strike out the defendant's counterclaim was premised mainly on the ground that the defendant's counterclaim on malicious litigation or prosecution and/or tort of abuse of process was obviously unsustainable as those causes of action were not recognised and should not be recognised by the court.

Held, dismissing the plaintiff's application with costs:

(1) The court ruled that neither malice nor the termination of the proceedings in the applicant's favour were necessary elements of the tort of abuse of process. The court was of the view that for the defendant to invoke the tort of abuse of process, he did not need to wait until the plaintiffs' action against him was terminated and terminated in the defendant's favour. The tort of abuse of process was independent of the claim for the tort of malicious prosecution/litigation. Thus, the defendant also need not prove that the plaintiffs had invoked the process of the court maliciously (see para 17).

(2) The court was not bound to reject in limine the defendant's counterclaim for the tort of malicious prosecution until it was proven that the litigation against the defendant was terminated. That was to be litigated before the court at the trial proper, not through affidavit evidence. It was for the defendant to bring evidence to proof that the requirement had been fulfilled. The defendant also had to prove to the court that his claim was within the domain of 'special cases' where the tort of malicious prosecution could be ventilated. At this stage all that was needed to be decided by the court was whether the defendant's pleading on this cause of action had shown to be obviously unsustainable. If the answer was in the positive, then the court must allow the plaintiffs' application to set aside the defendant's counterclaim (see paras 19–20).

(3) The defendant's counterclaim was not premature. The defendant had successfully established that the causes of action of malicious prosecution/litigation and tort of abuse of process in his counterclaim and the facts and history leading to those claims were reasonable and sustainable causes of action (see para 23).

(4) The learned judge had looked at the defendant's statement of defence and counterclaim and was satisfied that the causes of actions pleaded by the defendants had disclosed reasonable and sustainable cause of action. The court therefore ruled that the plaintiffs' claim under sub-para (a) of O 18 r 19 of the ROC 2012 had failed. The court also did not find the defendant's cause of action in his counterclaim to be wholly unnecessary

and irrelevant or scandalous, frivolous or vexatious. The plaintiff's claim under O 18 r 19(1)(b), therefore, failed. The plaintiffs had clearly understood the defendant's causes of action and responded in great and clear detail as to why this court shall reject the said counterclaim. Thus, the plaintiffs' reliance on O 18 r 19(1)(c) must also fail. It was also the finding of the court that the abuse as enumerated by a plethora of authorities had not been shown in the defendant's counterclaim. The defendant's counterclaim was obviously sustainable (see paras 25–26, 28–29, 33 & 36).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif dibawah A 18 k 19(1)(a), (b), (c) dan (d) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') untuk tuntutan balas defendan terhadap plaintif dibatalkan. Alasan-alasan tuntutan plaintif terhadap defendan adalah seperti berikut: (a) pelanggaran tanda dagangan berdaftar plaintif pertama; (b) kelirupaan produk atau perkhidmatan yang tidak berasal atau berkaitandengan plaintif pertama sebagai produk atau perkhidmatan yang berasal atau berkaitan dengan plaintif; dan (c) menggunakan kerja-kerja plaintif seperti yang dinyatakan dalam Jadual 1 penyata tuntutan. Pembelaan defendan tertumpu kepada terdapat persetujuan yang nyata atau tersirat oleh plaintif, untuk perkongsian, penyebaran dan penggunaan tanda dagangan plaintif pertama dan kerja-kerja plaintif di internet, termasuk di media sosial. Defendan menghujahkan bahawa plaintif telah memulakan tuntutan mereka terhadap defendan sebagai balasan terhadap defendan, untuk kerja-kerja defendan untuk faedah Perbadanan Pengurusan Verve Suites Mont Kiara ('VSMKMC') dan penduduk dan pemiliknya termasuk penglibatan defendan dalam prosiding mahkamah berasingan sebelum ini yang melibatkan VSMKMC terhadap plaintif pertama dan syarikat berkaitan, dan memaklumkan kepada penduduk dan pemilik Verve Suites Mont Kiara tentang prestasi yang tidak berprestasi dan prestasi buruk ejen pengurusan, sebuah syarikat berkaitan dengan plaintif pertama dan kedua, dalam pengurusan Verve Suites Mont' Kiara. Defendan menghujahkan bahawa pernyataan tuntutan plaintif adalah niat buruk, berniat jahat dan dengan motif tersembunyi merosakkan perniagaan dan reputasi defendan dan bukannya berdasarkan hak sah plaintif. Oleh itu, defendan membuat tuntutan balas terhadap plaintif kerana tindakan undang-undang atau pendakwaan yang berniat jahat dan/atau penyalahgunaan proses mahkamah. Permohonan plaintif untuk membatalkan tuntutan balas defendan adalah atas alasan bahawa tuntutan balas defendan terhadap litigasi atau pendakwaan yang berniat jahat dan/atau tort penyalahgunaan proses adalah jelas tidak dapat dikekalkan kerana ianya tidak diiktiraf dan tidak boleh diiktiraf oleh mahkamah.

Diputuskan, menolak permohonan plaintif dengan kos:

(1) Mahkamah ini memutuskan bahawa tiada niat jahat atau penamatan prosiding yang memihak kepada pemohon adalah unsur-unsur di dalam tort penyalahgunaan proses. Mahkamah berpendapat bahawa bagi defendan untuk membangkitkan isu tort penyalahgunaan proses, dia tidak perlu menunggu sehingga tindakan plaintif terhadapnya ditamatkan atau penamatan tersebut memihak kepada defendan. Tort penyalahgunaan proses adalah bebas dari tuntutan untuk tort pendakwaan/litigasi berniat jahat. Oleh itu, defendan juga tidak perlu membuktikan bahawa plaintif menjadikan proses mahkamah dibuat secara jahat (lihat perenggan 17).

(2) Mahkamah tidak terikat untuk menolak in limine tuntutan balas defendan untuk tort pendakwaan berniat jahat sehingga terbukti bahawa litigasi terhadap defendan telah ditamatkan. Hal ini akan diputuskan oleh mahkamah pada hari perbicaraan, bukan melalui keterangan afidavit. Adalah menjadi tanggungjawab defendan untuk mengemukakan bukti bahawa keperluan tersebut telah dipenuhi. Defendan juga perlu membuktikan kepada mahkamah bahawa tuntutannya berada di dalam keadaan 'khas' di mana tort pendakwaan berniat jahat boleh dibuktikan. Pada peringkat ini, perkara yang perlu diputuskan oleh mahkamah adalah sama ada defendan merayu atas sebab tindakan ini telah terbukti jelas tidak dapat dikekalkan. Sekiranya jawapannya positif, maka mahkamah mesti membenarkan permohonan plaintif untuk mengenepikan tuntutan balas defendan (lihat perenggan 19–20).

(3) Tuntutan balas defendan tidak pramatang. Defendan telah berjaya membuktikan bahawa kausa tindakan tindakan pendakwaan/litigasi berniat jahat dan tort penyalahgunaan proses di dalam tuntutan balasnya dan fakta yang membawa kepada tuntutan tersebut adalah sebab tindakan yang munasabah dan boleh dipertahankan (lihat perenggan 23).

(4) Hakim terpelajar di dalam kes ini telah melihat penyata pembelaan dan tuntutan balas defendan dan berpuas hati bahawa punca-punca tindakan yang dirayu oleh defendan telah mendedahkan sebab tindakan yang munasabah dan boleh dipertahankan. Oleh itu, mahkamah memutuskan bahawa tuntutan plaintif di bawah sub-perenggan (a) A 18 k 19 ROC 2012 telah gagal. Mahkamah juga tidak menemui kausa tindakan defendan di dalam tuntutan balasnya tidak relevan atau menyusahkan atau meremehkan. Oleh itu, tindakan plaintif di bawah A 18 k 19(1)(b) adalah tidak boleh dipertahakan. Plaintif telah memahami dengan jelas kausa-kausa tindakan defendan dan bertindak balas dengan terperinci dan jelas mengapa mahkamah ini akan menolak tuntutan balas tersebut. Oleh itu, kebergantungan plaintif kepada A 18 k 19(1)(c) juga mesti gagal. Mahkamah ini juga berpendapat bahawa

penyalahgunaan seperti yang diputuskan oleh otoriti-otoriti sebelumnya tidak ditunjukkan di dalam tuntutan balas defendan. Tuntutan balas defendan jelas boleh dipertahankan di dalam kes ini (lihat perenggan 25–26, 28–29, 33 & 36).]

Cases referred to

AIC Dotcom Sdn Bhd (suing in a representative capacity for MTEX Corp Sdn Bhd) v MTEX Corp Sdn Bhd [2003] 4 MLJ 324, HC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (folld)

Benalec Holdings Bhd & Ors v Datuk Leaw Ah Chye & Anor [2017] MLJU 1826; [2017] 1 LNS 1698, HC (refd)

Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd [2001] MLJU 566; [2001] 4 AMR 4807, HC (refd)

EON Bank Berhad v Cepad Group Sdn Bhd & Ors [2006] 4 MLJ 362, HC (refd)

Gan Seng Biang v Priyamas Export Corporation Sdn Bhd and anor [2010] MLJU 1319, HC (refd)

Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors [1996] 3 MLJ 259, HC (refd)

Godrej Sara Lee Ltd v Siah Teong Teck & Anor (Part 1) [2007] 7 MLJ 153, HC (refd)

Hadi bin Hassan v Suria Records Sdn Bhd & Ors [2005] 3 MLJ 522; [2004] 8 CLJ 225, HC (folld)

Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd [2011] 2 MLJ 192, CA (folld)

Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor [2008] 1 MLJ 11; [2008] 1 CLJ 651, CA (refd)

Jamir Hassan v Kang Min [1992] 2 MLJ 46, HC (refd)

KHK Advertising Sdn Bhd v Siera Management Sdn Bhd (in liquidation) [2018] 4 MLJ 168, CA (folld)

Lim Eng Heng v Lim Sam Keow & others [2003] MLJU 47, HC (refd)

M Pakiam v YP Devathanjam [1952] 1 MLJ 58, CA (refd)

Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425; [1998] 2 CLJ 340, CA (folld)

Meeriam Rosaline a/p Edward Paul & Ors v William Singam a/l Raja Singam (suing as Public Officer of Pertubuhan Persaudaraan Kristian Thaveethin Kudaram, Ipoh, Perak) [2010] 4 MLJ 541, CA (refd)

NSE Energy Sdn Bhd v Arkema Thiochemicals Sdn Bhd [2019] MLJU 256; [2019] 1 LNS 351, HC (refd)

Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor [1994] 1 MLJ 156, HC (refd)

Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16; [1993] 3 CLJ 606, SC (refd)

Sarjit Singh Khaira v Government of the State of Sarawak & Anor [1990] 2 MLJ

A 251; [1990] 2 CLJ 95; [1990] 3 CLJ Rep 59, HC (refd)
See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235; [2012] 1 LNS 817, CA (refd)
Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1; [2013] 6 CLJ 673, FC (refd)
B *Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Negeri Pahang Darul Makmur (via his secretary Dato' Ahmad Tajudin bin Sulaiman)* [2010] 8 MLJ 57, HC (refd)
Sim Kiang Chiok v Southeast Asia Special Asset Management Bhd [2016] 1 MLJ 57, CA (refd)
C *Speed Seal Products Ltd v Paddington and another* [1985] 1 WLR 1327, CA (refd)
Tetuan Bee Ling & Co lwn Vijendran Ponniah [2010] 6 CLJ 643, CA (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1; [1975] 1 LNS 133, PC (refd)
D *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240, FC (refd)
Yick Hoe Ferrous Steel Sdn Bhd v CTMCC Engineering(M) Sdn Bhd [2018] MLJU 1905, HC (refd)
Sivakumar a/l Varatharaju Naidu v Ganesan a/l Retanam [2011] 6 MLJ 70, CA (refd)
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Legislation referred to

Rules of Court 2012 O 18 r 19(1), (1)(a), (1)(b), (1)(c), (1)(d)

F *Hoi Jack S'ng (Ngo Su Ning with him) (Lee Hishammuddin Allen & Gledhill) for the plaintiffs.*
Au Yong Wai Nyan (YH Teh & Quek) for the defendant.

Mohd Radzi Harun J:

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INTRODUCTION

[1] This is an appeal by the plaintiffs against the decision of this court which had dismissed their application pursuant to O 18 r 19(1)(a), (b), (c), (d) of the
H Rules of Court 2012 ('the ROC 2012') for the defendant's counterclaim against the plaintiffs be struck out.

[2] Below are my grounds in coming to such decision.

I BACKGROUND

[3] The plaintiffs' causes of action against the defendant include the following:

(a) infringement of the first plaintiff's registered trademarks No 06005843 for the mark 'Verve' in Class 37, No 06005844 for the mark 'Verve' in Class 43, and No 2011014519 for the mark 'Verve' in Class 37;

(b) passing off products or services not originating from or connected to the first plaintiff as a product or services originating from or connected to the plaintiffs; and

(c) using the plaintiffs' works as set out in Schedule 1 to the statement of claim.

[4] The defendant's defence is mainly premised on his contention that there was express or implied consent by the plaintiffs, for the sharing, dissemination and utilisation of the first plaintiff's trademark and the plaintiffs' works, on the internet including on social media. The defendant further pleaded that the plaintiffs had instituted their claims against the defendant as a vendetta against the defendant for the defendant's works to the benefit of the Verve Suites Mont' Kiara Management Corp ('VSMKMC') and its residents and proprietors which include the defendant's involvement in earlier separate court proceedings involving the VSMKMC against the first plaintiff and its related companies, and informing the residents and proprietors of the Verve Suites Moint' Kiara of the non-performance and/or poor performance of the managing agent, Bukit Kiara Property Services Sdn Bhd, a related company with the first and second plaintiffs, in the management of the Verve Suites Mont' Kiara.

[5] The defendant pleaded that the plaintiffs' statement of claim is in bad faith, malicious and with ulterior motive of damaging the defendant's business and reputation rather than furthering any legitimate interest of the plaintiffs. Consequently, the defendant counterclaims against the plaintiffs for malicious litigation/prosecution and/or abuse of process of the court.

THE APPLICATION

[6] The plaintiffs premised their application mainly on the ground that the defendant's counterclaim on malicious litigation/prosecution and/or tort of abuse of process is obviously unsustainable as those causes of action are not recognised and should not be recognised by this court.

Tort of malicious prosecution

[7] Relying on *Benalec Holdings Bhd & Ors v Datuk Leaw Ah Chye & Anor* [2017] MLJU 1826; [2017] 1 LNS 1698 and *Yick Hoe Ferrous Steel Sdn Bhd v CTMCC Engineering(M) Sdn Bhd* [2018] MLJU 1905, the plaintiffs'

counsel submitted that the tort of malicious prosecution cannot be pursued in the present civil proceeding.

[8] For a claim of tort of malicious prosecution to be successful, the plaintiffs argued that the defendant must prove that the plaintiffs' present action against the defendant has commenced and determined in favour of the defendant. As the proceeding against the defendant is still on-going and has not be fully litigated, and no decision has been entered in favour of the defendant, the plaintiffs submitted that the defendant's application counterclaim is premature, obviously unsustainable and must be struck out: see *Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors* [1996] 3 MLJ 259 and *Yick Hoe Ferrous Steel Sdn Bhd.*

[9] The plaintiffs' counsel further submitted that for the defendant's counterclaim to be allowed, the defendant shall prove that there is an absence of reasonable cause of action on the part of the plaintiffs. The plaintiffs argued that they had pleaded reasonable cause of action against the defendant pertaining to the defendant's infringement of the first plaintiff's registered trademark and the use of the plaintiffs' works by the defendant without the plaintiffs' consent and permission, and the defendant's act of passing off its services as the services of the plaintiffs. On the contrary, the plaintiffs' submitted that the defendant's defence is mainly premised on his contention that there was express or implied consent by the plaintiffs for the defendant's use of the first plaintiff's trademark and the plaintiffs' works, which is a mere denial and a sham defence.

[10] The defendant shall further satisfy this court that the plaintiffs were actually malice in instituting the present action against the defendant. The plaintiffs argued that following the Court of Appeal's decision in *Tetuan Bee Ling & Co lwn Vijendran Ponniah* [2010] 6 CLJ 643, in the event that this court decides that there exist a reasonable cause of action in the plaintiffs' claims, the issue of malice need not be addressed. That notwithstanding, the plaintiffs' further argued that the actions brought against the defendant is in good faith with the intent to protect the plaintiffs' legitimate interest in the first plaintiff's trademark and the plaintiffs' works.

[11] Aside from the above, the plaintiffs' counsel argued that the defendant must have suffered damage as a result of the proceeding if he is to succeed in his action for malicious prosecution.

Tort of abuse of process

[12] Relying on *Gasing Heights Sdn Bhd*, the plaintiffs' counsel argued that the tort of abuse of process is not recognisable by this court. In that case,

Mahadev Shankar J (as His Lordship then was) held that a person who claims that the proceeding against him is an abuse of process must take objection in those very proceeding under O 18 r 19(1)(d). His Lordship further held:

> The filing of the collateral action as was done in this case was itself an abuse of process which must result as happened here in its being struck out.

[13] Relying on the UK Court of Appeal decision of *Speed Seal Products Ltd v Paddington and another* [1985] 1 WLR 1327, the Court of Appeal decision of *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425; [1998] 2 CLJ 340, and the High Court decision of *NSE Energy Sdn Bhd v Arkema Thiochemicals Sdn Bhd* [2019] MLJU 256; [2019] 1 LNS 351, the defendant's counsel submitted that he is entitled to file his counterclaim for malicious prosecution even if the plaintiffs' Suit has not been determined in the defendant's favour. The tort of malicious prosecution is available in civil proceedings as decided by the Court of Appeal in *Tetuan Bee Ling & Co lwn Vijendran Ponniah* [2010] 6 CLJ 643, and not limited to bankruptcy and winding up proceedings alone. It was further submitted that the elements of malicious prosecution to be established by the defendant are:

(a) proceedings against the defendant has commenced;

(b) the said proceedings were concluded in favour of the defendant; and

(c) the plaintiff commenced the proceedings against the defendant with no reasonable or probable cause, and was commenced maliciously.

[14] On his claim for tort of abuse of process, the defendant's counsel argued that the Court of Appeal in *Malaysia Building Society Bhd* set out the elements that needed to be established as follows:

(a) the process complained of must have been initiated;

(b) the purpose of the plaintiffs initiating that process against the defendant must be collateral, aimed at producing a result not intended by the invocation of that process; and

(c) the defendant must have suffered some damage or injury in consequence of that process.

[15] The defendant argued that as revealed in his statement of defence and his affidavit in reply to the plaintiffs' current application, the plaintiffs had instituted their claims against the defendant as a vendetta against the defendant for the latter's works involving the defendant and the plaintiffs and the plaintiffs' related companies pertaining to the VSMKMC and the management of the Verve Suites Mont' Kiara. With that backdrop, the plaintiffs' statement of claim is in bad faith, malicious and with ulterior motive of damaging the

defendant's business and reputation rather than furthering any legitimate interest of the plaintiffs. Consequently, the defendant counterclaims against the plaintiffs for malicious litigation/prosecution and/or abuse of process of the court had fulfilled the requisite elements.

FINDINGS

[16] The judgment of Gopal Sri Ram JCA (as His Lordship then was) in *Malaysia Building Society Bhd* elucidated on the tort of collateral abuse of process as follows:

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.
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> The position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v Sperrings Ltd & Ors* [1977] 1 WLR 478, where at p 489 he said:
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> > In a civilized society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.
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> Though a dissenting judgment, the principle enunciated by the Master of the Rolls has been accepted as authoritative of what constitutes an abuse of process.
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> ... Because it has been developed on a case by case basis as other common law wrongs have, the tort of abuse of process, its entry into the law of torts, has undergone change through history. The essential elements of the tort in present day context have been set out in the instructive judgment of the High Court of Australia in *Williams v Spautz* 107 ALR 635.
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> ... In my judgment, the essential elements of the tort of abuse of process are these:
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> (1) The process complained of must have been initiated;
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> (2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and

(3) The plaintiff must have suffered some damage or injury in consequence. A

It is to be stressed that neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort. To put it plainly, a plaintiff in an action for abuse of process need not prove that the defendant had invoked the process of the court maliciously. Neither does he have to prove that the proceedings terminated in his favour. B

It is only upon proof of the elements that go to make up the tort of collateral abuse of process, that a plaintiff is entitled to an award of damages.

[17] This court held on to the principle laid down in the case above and ruled that neither malice nor the termination of the proceedings in the applicant's favour are necessary elements of the tort of abuse of process. To put it plainly, for the defendant to invoke the tort of abuse of process, he does not need to wait until the plaintiffs' action against him is terminated and terminated in the defendant's favour. The tort of abuse of process is independent of the claim for the tort of malicious prosecution/litigation. Thus, the defendant also need not prove that the plaintiffs had invoked the process of the court maliciously. C D

[18] On the defendant's claim for malicious prosecution, this court referred to the decision of the Court of Appeal in *KHK Advertising Sdn Bhd v Siera Management Sdn Bhd (in liquidation)* [2018] 4 MLJ 168 where it was held: E

[55] To reiterate, to sustain a claim for malicious prosecution it is imperative that a plaintiff prove that there was termination of proceedings in favour of the plaintiff (see Semesta). As explained by the English Court of Appeal in *Bynoe v Governor and Company Of The Bank Of England and Williams.* [1902] 1 KB 467, this ingredient is necessary so that the court hearing the malicious prosecution is not converted into an appellate court of the previous proceedings. F

... [77] It is important to bear in mind that as confirmed by the case of Gregory the tort of malicious prosecution was only extended to the civil context in special cases. The House of Lords in Gregory stressed that it was undesirable and unnecessary to extend the established circumstances of malicious prosecution as any apparent injustice arising from any unwarranted civil proceeding are either already sufficiently protected under other torts or capable of being addressed by any necessary and desirable extensions of the torts. G H

[19] The principle distilled by this court from the above authorities is that firstly this court is not bound to reject *in limine* the defendant's counterclaim for tort of malicious prosecution until it is proven that the litigation against the defendant is terminated. That is to be litigated before this court at the trial proper. It is for the defendant to bring evidence to proof that this requirement has been fulfilled. It is also for the defendant to proof to this court that his claim comes within the domain of 'special cases' where the tort of malicious prosecution could be ventilated as decided in *KHK Advertising.* It follows that I

A the defendant's counterclaim is not premature as argued by the plaintiffs.

[20] Whether or not the defendant had successfully proven that plaintiffs to have committed the tort of abuse of process is a question of law and fact that would be determined by this court only after a trial is conducted, not through
B affidavit evidence. At this stage all that needed to be decided by this court is whether the defendant's pleading on this cause of action had shown to be obviously unsustainable. If the answer is in the positive, then this court must allow the plaintiffs' application to set aside the defendant's counterclaim.

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[21] It is trite that in determining an O 18 r 19 application, this court shall refrain from making a finding on the substantive action and avoid resolving contradicting evidence before it: *Meeriam Rosaline a/p Edward Paul & Ors v William Singam a/l Raja Singam (suing as Public Officer of Pertubuhan Persaudaraan Kristian Thaveethin Kudaram, Ipoh, Perak)* [2010] 4 MLJ 541;
D and *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156. If, having perused the pleadings and affidavit evidence, this court found that the defendant's cause of actions in his counterclaim being obviously unsustainable, then this court shall make an appropriate order to allow the
E plaintiffs' application and struck out that counterclaim pursuant to O 18 r 19: *Sarjit Singh Khaira v Government of the State of Sarawak & Anor* [1990] 2 MLJ 251; [1990] 2 CLJ 95; [1990] 3 CLJ Rep 59 and *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7.

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[22] To satisfy itself that the defendant's claim is obviously sustainable or otherwise, this court is entitled to examine the history of the case that had arisen between the parties as expounded in their respective pleadings. This is in consonant with the decision of Haidar Mohd Noor J (as His Lordship then
G was) in *Jamir Hassan v Kang Min* [1992] 2 MLJ 46:

> If I am wrong in my construction of the law I then need to examine the pleadings and the affidavit evidence to see whether there is a cause of action disclosed on adverse possession ... There does not seem to be evidence shown by the plaintiff in the pleadings that he is either in physical possession of the land or exercising
H dominion over the property. In the circumstances he failed to show evidence of adverse possession and O 18 r 19 of RHC can rightly be invoked.
>
> Further, the court is entitled to look at the history of this case to determine whether the pleadings disclose a form of action. This is what Lord Parker CJ said in *Re Vernazza* [1959] 2 All ER at p 202:

I

> > In considering whether any proceedings are vexatious one is entitled to and must look at the whole history of the matter and it is not determined by whether the pleading discloses a form of action. Indeed, that is the principle applied under the rules of Court when application is made to strike out a pleading. Though the pleading may be in order, the Court in its inherent jurisdiction is entitled to look

at affidavits as to the history of the matter, and if in the light of the history the action is vexatious, the matter can be struck out and the action dismissed.

[23] Having applied the principle as laid down in *Malaysia Building Society Bhd* and *KHK Advertising Sdn Bhd*, I had concluded that the defendant's counterclaim is not premature. The defendant had successfully established that the causes of action of malicious prosecution/litigation and tort of abuse of process in his counterclaim and the facts and history leading to those claims are reasonable and sustainable cause of action.

Order 18 r 19(1)(a)

[24] In considering the plaintiffs' application under sub-para (a) of O 18 r 19(1), this court first of all applied the time-tested principle set out by the Federal Court in *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1; [2013] 6 CLJ 673. In that case, the court held that when application is made pursuant to O 18 r 19(1)(a), not only must I apply the well-known tests laid down in *Bandar Builder*, but more importantly I must 'have regard to the quality of and all the circumstances surrounding the plea ... and also bear in mind that the effect of striking out a pleading is to completely deprive a plaintiff from having his day in court'. The next question is how do I determine that the defendant's cause of action in his counterclaim is reasonable and sustainable? I relied on the principle enunciated by the Court of Appeal in *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2012] 1 LNS 817, where Ramly Ali JCA (as His Lordship then was) held:

> ... The only limitation imposed under sub-r (2) is that for an application under sub-para, (a), no evidence is admissible. However, where the court proceeds to decide an application under any other subparagraph, affidavit evidence should be admissible ... What the learned judge should have done is to deal with the issue under sub-para, (a) first and to ignore completely the two affidavits filed by the parties; before proceeding to deal with sub-paras, (b) and (d). The learned judge must bear in mind that striking out a claim for no reasonable cause of action under sub-para (1)(a) is only appropriate in a plain and obvious case. The learned judge must be satisfied that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiffs to the relief which they asked for ... Just look at the statement of claim. The test to be applied is whether on the face of the statement of claim, the court is prepared to conclude that the cause of action is obviously unsustainable.

[25] I had done exactly that. I had looked at the defendant's statement of defence and counterclaim. I am satisfied that the causes of actions pleaded by the defendant, as I had discussed in the earlier paragraphs, had disclosed reasonable and sustainable cause of action. This court therefore ruled that the plaintiffs' claim under sub-para (a) failed.

Order 18 r 19 (1)(b)

[26] For the plaintiffs to succeed in their application to strike out the defendant's cause of action under this subparagraph, the plaintiffs must show that the counterclaim is 'scandalous', which had been decided in numerous authorities to mean wholly unnecessary and irrelevant, not just unpleasant allegations: *Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; [2001] 4 AMR 4807; *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192; *Godrej Sara Lee Ltd v Siah Teong Teck & Anor (Part 1)* [2007] 7 MLJ 153; *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 1 MLJ 11; [2008] 1 CLJ 651; and *Sivakumar a/l Varatharaju Naidu v Ganesan a/l Retanam* [2011] 6 MLJ 70. I did not find the defendant's cause of action in his counterclaims as wholly unnecessary and irrelevant.

[27] As to what constitute 'frivolous or vexatious', the following are some illustrations:

(a) no locus standi: *AIC Dotcom Sdn Bhd (suing in a representative capacity for MTEX Corp Sdn Bhd) v MTEX Corp Sdn Bhd* [2003] 4 MLJ 324;

(b) res judicata: *Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Negeri Pahang Darul Makmur (via his secretary Dato' Ahmad Tajudin bin Sulaiman)* [2010] 8 MLJ 57;

(c) wrong party is sued: see *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240;

(d) illegality: *Lim Eng Heng v Lim Sam Keow & others* [2003] MLJU 47;

(e) unfounded claims: *EON Bank Berhad v Cepad Group Sdn Bhd & Ors* [2006] 4 MLJ 362; or

(f) claim is statute-barred: *Sim Kiang Chiok v Southeast Asia Special Asset Management Bhd* [2016] 1 MLJ 57.

[28] Having perused the parties' affidavits, this court does not find that the defendant's cause of action as scandalous, frivolous or vexatious. The respondents' claim under O 18 r 19 (1)(b), therefore, failed.

Order 18 r 19(1)(c)

[29] For the plaintiffs to succeed under this limb, they must satisfy the court that the defendant had not complied with the rules of pleadings, in that the defendant's counterclaim had raised causes of action which are not clear and confusing that would result in the plaintiffs being unable to answer: *Gan Seng*

Biang v Priyamas Export Corporation Sdn Bhd and anor [2010] MLJU 1319; and *M Pakiam v YP Devathanjam* [1952] 1 MLJ 58. I did not find so. On the contrary, the plaintiffs had clearly understood the defendant's causes of action and responded in great and clear detail as to why this court shall reject the said counterclaim. Thus, the plaintiffs' reliance of this paragraph must also fail.

Order 18 r 19(1)(d)

[30] The Court of Appeal in *Harapan Permai Sdn Bhd* has held that when a court's process is not used in a bona fide manner, that tantamount to an abuse of the process of the court.

[31] In *Hadi bin Hassan v Suria Records Sdn Bhd & Ors* [2005] 3 MLJ 522; [2004] 8 CLJ 225, the court ruled that a paragraph of the plaintiff's statement of claim which was crafted based on the third defendant's written statement to the plaintiff admitting he had plagiarised a song originally written by the plaintiff was ruled as an abuse of the process of the court because it contravened the 'without prejudice' rule. The court further ruled that striking out an action on the ground that it is an abuse of the process of the court under O 18 r 19(1)(d) of the ROC 2012 envisages a situation where the process of the court has not been used in a bona fide manner and that it has been abused. This stemmed from the fact that it is the duty of the court to protect its machinery from being abused and used improperly. The plaintiff had abused the process of the court when he incorporated the said paragraph in his statement of claim.

[32] In applying the principles as laid down by the authorities cited above, this court is cognisant of the legal position that it has a legal duty to prevent any form of abuse of the court process which could fall within any of the endless and broad categories of abuse that 'will certainly proliferate pursuant to the myriad of circumstances available from the factual matrix found in each particular case': *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 1 MLJ 11; [2008] 1 CLJ 651.

[33] It is the finding of this court that the abuse as enumerated by a plethora of authorities had not been shown in this instance in the defendant's counterclaim.

CONCLUSION

[34] At this juncture, this court reflects on the oft-repeated reminders which was re-breathed by the Court of Appeal in *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2012] 1 LNS 817 where it was held:

> the power to strike a case under the order without having to go for trial should be exercised sparingly and only in a plain and obvious case. The procedure is of a

summary nature. The party affected should not be deprived of his right to have his case proceeded by a proper trial unless the claim is obviously unsustainable.

[35] To this end, this court is reminded by the following remarks by Peh Swee Chin SCJ when His Lordship delivered the decision of the Supreme Court in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16; [1993] 3 CLJ 606; [1993] 3 CLJ 606, having referred, with affirmation, to the decision of the Privy Council in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1; [1975] 1 LNS 133:

> It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O 18 r 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

[36] The defendant's counterclaims are obviously sustainable. The plaintiffs' application was henceforth dismissed with costs.

Plaintiff's application dismissed with costs.

Reported by Muhamad Azham Marwan